VIRGINIA LAW REGISTER

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The Albemarle Bar, VI.

It is very seldom that two such men as Thomas Walker Gilmer and William Cabell Rives have been found practicing together at the same Bar and living in the same county at the same time. Gilmer was a wit, an orator, a profound lawyer—great as an advocate, counsellor or at the Chancery Bar. He had been Legislator, Congressman, Governor of Virginia and Secretary of the Navy before he was forty-six years of age—and those who knew him best predicted that he would have reached the highest office in the gift of the Nation, had not an untimely death removed him from a busy, active, and useful life. Born in 1798, the grandson of Geo. Gilmer of Pen Park and the son of Geo., Jr., and Miss Hudson, a woman of unusual taste, talent, intellect and piety and a great-grandson of Dr. Thomas Walker of "Castle Hill". He was educated first at his Uncle Peter Minor's school at Ridgeway. Later on he was a pupil of Frank Carr—a well known educator who said he was the most proficient student he ever knew. He finally studied law with his Uncle Peachy R. Gilmer in Bedford County and commenced the practice of law at Scottsville, that quiet little town on the James River in the southern part of Albemarle—then a place of some importance as the shipping point for the western counties on the James River and Kanawha Canal. After a few months there he moved to St. Louis, Mo., but his father's failing health recalled him to his native county and he settled in Charlottesville, qualifying at the Bar in the early twenties. Of wide and sound learning, acute, adroit and resourceful he soon went to the front rank. His power as an advocate was noted; his strength before juries and his ready wit and fine talent added to a very pleasing personality and charming manners gave him great pop-

ularity as well as reputation. In 1825 he was appointed a delegate to the Constitutional Convention which met in Staunton and there he met his wife, Miss Anne E. Bacon, who lived well on into the time of the writer of this article and who was noted for her wit and strong intelligent mind. Of broad and eclectic reading she was a charming conversationalist and though practically secluding herself after her husband's death, she was the delight of a wide circle of friends.

Gilmer edited the Charlottesville Advocate in 1828-9 in the interest of Andrew Jackson's candidacy and during that campaign became acquainted with John Randolph of Roanoke, whose admiration for his talent lasted during Randolph's life. One of Gilmer's daughters married Saint George Tucker, a half nephew of the Roanoke Sage. Gilmer was elected to the lower house of the Virginia Legislature in 1829, re-elected in 1830 and as a member of the Committee on Courts of Justice did important work in the remodeling of the statute laws to conform with the amended Constitution. Governor Floyd appointed him Commissioner to prosecute Virginia's Revolutionary claims against the United States and he spent considerable time in Washington in that work. In 1832 he was re-elected to the Legislature. He took a strong stand against President Jackson's attitude towards South Carolina and in a vigorous speech supported the right of secession. He was re-elected in 1833 as a strong States Rights man. He became the leading opponent of the President's policies among Virginia Democrats and was defeated for re-election in 1835. Joining the Whig Party he opposed Van Buren's election, but was re-elected to the Legislature in 1838 and became its speaker—an office he twice held. In 1840 he was elected Governor of the State as the candidate of the Conservatives and Whigs, being just forty-two years old. During his administration came up the celebrated controversy with Governor Seward of New York. Seward refused to surrender to the Virginia authorities three men charged with slave stealing in Virginia and who had fled to New York, refusing to comply on the ground that slave stealing was not a crime in New York. Great indignation was aroused by this and the General Assembly in 1841 passed severe retaliatory laws against New York. Three days after

these laws were passed Seward demanded of the Virginia Executive the surrender of a man charged with felony in New York and under arrest in Virginia. Governor Gilmer replied that the fugitive would be surrendered when Virginia's three criminals were turned over to that state's authorities. With the most strange contradiction of their previous attitude, the same Legislature which passed the bitter retaliatory Legislation passed a resolution disapproving Gilmer's action. He at once resigned, and though the General Assembly at first refused to accept the resignation, he persisted. On his return home he was immediately elected to Congress and re-elected. In 1844 President Tyler appointed him Secretary of the Navy. He had hardly entered the Cabinet when on going upon the Frigate Princeton to inspect the big guns, one was fired, exploded, and Governor Gilmer with several others killed instantly on Feb. 28, 1844. On that occasion Mr. Gardiner of New York was killed and his young and beautiful daughter later on became the wife of President Tyler. A son of President Tyler, the distinguished scholar, educator and author, Lyon Gardiner Tyler, in later years married Annie Baker Tucker, the granddaughter of Governor Gilmer.

Many anecdotes of Gilmer's wit and readiness were told by his contemporaries. One is worth repeating. Commodore Uriah Levy, the owner of Monticello, the old home of Jefferson, was a man of unquestioned courage, but of an ungovernable temper. On one occasion he fell out with his overseer and beat him unmercifully. The overseer employed Gilmer to sue the Commodore for Assault and Battery and the suit was brought. V. W. Southall was employed by the Commodore and guyed Gilmer unmercifully for bringing the suit, for at the time neither party to the controversy could testify unless called by his opponent and the only other witnesses were slaves who could not testify. So Mr. Southall teased Gilmer day in and day out, even up to the time the jury was sworn. But he found the laugh on the other side in a very short while after the jury was sworn. Gilmer arose to open the case and in the most confused and apologetic way, stated that he was afraid he had made a serious mistake in bringing the action; that he understood Commodore Levy had beaten his client, but since coming

into court he had reason to suspect that this lineal descendant of Shylock—(at this the old Commodore straightened up and his eyes flashed) had been insolent to the gentleman (his client) who had so far demeaned himself as to become the manager of a Jew, and thereupon his client had thrashed the Israelite until he begged for mercy. He went no further. "It's a damned lie," the Commodore yelled, as he jumped to his feet, forgetting the dignity of the court and everything else in his wrathful indignation. "I beat the hound until he couldn't walk. I thrashed him with my cane and welnigh broke every bone in his damned body." "Ah! Commodore," said Gilmer smilingly, "in that case kindly come around to the witness box and be sworn as my witness." An old lawyer who witnessed the occurrence said it was worth a great deal to see Mr. Southall's demeanor as the Commodore shouted aloud. For a moment he seemed dazed and then stooping down, took his hat, pulled it over his brows and literally rushed out of the Court House. The Commodore took the stand, told the whole truth without excusing himself in the slightest way and paid the $600 verdict which the jury found against him within ten minutes after it was rendered. "I would have paid a thousand sir," he said to Gilmer, "rather than to have it said I begged mercy of any man." "I knew that, Commodore," replied Gilmer, "and I knew you to be a truthful gentleman. Accept my apology for the rather rude way in which I brought you out." And the two shook hands and walked out of the Court Room together—we seriously suspect to the old Swan Tavern nigh unto the Court House, where there was no prohibition and plenty of mint and "fixins" in season.

It is said that the only time Governor Gilmer was bested and absolutely confused was at Nelson Court House, when after leaving the Democratic Party he was making a Whig speech. He spoke with wonderful eloquence and concluded by saying that he heard "the triumphant march of the great Whig Party going on to victory with banners flying and music in the air." His opponent rose and turning to the Governor, said in a clear, loud voice, "Ah! yes, Governor, I have no doubt you hear the music, but isn't it a Whig air with Democratic variations?" And the crowd yelled and Gilmer flushed a fiery red and spoke

no more that day. He was a very zealous Christian and prominent member of the Presbyterian Church. Two of his sons became Presbyterian Ministers.

William Cabell Rives was not only a contemporary of Gilmer's, but had many a hard fought battle with him, both at the Bar and on the Hustings. Rives was born at Oak Ridge, the beautiful home of his father in Nelson County, now the residence of Thos. F. Ryan, on May 4th, 1793. He graduated at William and Mary College and read law under Mr. Jefferson. Whilst at William and Mary he met Meriwether Lewis Walker, of "Indians Fields" in Albemarle, and whilst visiting him met and married Judith Walker, a cousin of Lewis' and granddaughter of Dr. Thomas Walker of "Castle Hill," which Judith had inherited through her father Francis Walker. In this way "Castle Hill" came into the possession of the Rives family and is owned today by Amelie—Princess Troubetskoi—Mr. Rives' granddaughter.

Mr. Rives commenced the practice of law in Albemarle in the early twenties. James Barbour and Chapman Johnson were members of that Bar during the same period and John B. Spiece, who qualified about the same time, and of whom we wrote in our September, 1920, number (6 V. L. R. 382), lived for several years after the writer of this article came to the Bar and practiced at the same time, thus practicing during a period of over seventy years. We have often heard him speak of Mr. Rives as a very handsome man and a "very prodigious" speaker. In 1816 Mr. Rives was elected a delegate to the State Convention and in 1817-1818-1819 and 1822 was a member of the Virginia Legislature. He served as a Democrat in the 18th, 19th and 20th Congresses of the United States. He was Minister to France 1829-1832. On the resignation of Tazewell from the United States Senate he was elected to succeed him and served one year. He resigned because he was unwilling to support the Senate's vote of censure of the President for removing the deposits. Mr. Rives favored this action on the part of the President, but the General Assembly highly reprobating it, he resigned. In 1836 John Tyler having resigned from the Senate for very much the same reason Mr. Rives had resigned, i. e., a difference of opinion between him and the

General Assembly, Mr. Rives was elected Senator in his place and served for nearly nine years. He was again appointed Minister to France and occupied that position from 1849 to 1853. Whilst in Paris his wife, who was an unusually brilliant and cultivated woman, published a small volume of sketches which were of great interest and literary skill. On his return to Virginia he occupied himself with a Life of James Madison, the largest and most complete biography of that Statesman, which he only completed a short while before his death At the outbreak of the Civil War he was elected a member of the Provisional Congress of the Confederate States and subsequently a member of the 1st and 2nd Congresses of the Confederate States. He died in April, 1868. As a lawyer Mr. Rives' chief fame was as an Advocate. Though small in stature he was unusually handsome with chestnut hair, blue eyes and splendid features. This charm of face and figure had the added attraction of a very melodious and powerful but well modulated voice. He was probably one of the most cultivated and able orators in the country, and as persuasive as cultivated he was a very forceful and successful lawyer before juries. We do not mean by this that he was any less able at the Chancery Bar, but his fame lay in his forensic efforts. It was a powerful Bar at which he practiced, but he was one of its leaders as well as ornaments.

Attorneys for the Commonwealth: Appeal from Board of Supervisors.

We occasionally come across Virginia statutes which appear to be so incongruous that we wonder how they ever came to be enacted by the General Assembly. Some of them never come into the courts, and public attention is not called to them; others lie dormant, so to speak, until their awakening surprises the being that aroused them and the courts as well. Probably one of the most amazing of these dormant statutes has been called into action lately. We allude to Section 2762 of the Code of 1919, which has been a law since 1887.

This section provides that: "When any order for a levy is

made by the Board of Supervisors, which, in the opinion of the attorney for the commonwealth is illegal, *or from which he shall be required to appeal by any six freeholders of the county* (italics ours) the said attorney shall appeal therefrom, within thirty days after such order is made, to the circuit court of said county, etc., etc." So far, so good, but Section 2759 provides, *inter alia,* that: "The attorney for the Commonwealth shall be present at each and every meeting of said Board and shall give *his legal opinion when required by said board on all* questions arising before said board." (Italics ours).

Now that portion of Section 2762 which requires the attorney for the Commonwealth to appeal from any levy which in his opinion is illegal is all right, for it is to be supposed that such a levy was made without consulting him or against his advice; but the awkward situation might arise, and indeed has arisen, in which six freeholders request an appeal from a levy which he has advised the board of supervisors is legal and proper. It becomes his duty, therefore, to appeal from his own judgment, and necessarily to argue before the court that a levy which in his judgment is legal and proper, is illegal. With what face can he do this? And it is to be noted that the appeal must be taken *by him*—not by the six freeholders, and we have the solemn farce of an officer appealing from his own judgment and asking the court to reverse him on his own motion, when in his own mind he is satisfied that the levy is legal. This is Philip *drunk* appealing from Philip *sober* with a vengeance.

Then an interesting question arises: Who is responsible for costs? It is the attorney for the Commonwealth who appeals. Must he frame his appeal as by himself *ex relatione* the six freeholders, or play a lone hand? And how far is he to carry the appeal? The statute says "to the circuit court of said county," and stops there. Suppose the court holds that the levy is legal and proper, and the six freeholders desire an appeal to our Supreme Court. Is the attorney for the Commonwealth to be responsible for the costs of getting up the record and paying the tax and for printing the record? Or does his duty under the statute cease with the appeal to the circuit

court? And if it does, can the six freeholders carry on the appeal? If it be correct and the statute appears to so read, that the only appeal is to the circuit court, then no one can carry it further; and it being the appeal of the attorney for the Commonwealth, can any one carry it on if he declines to allow it? These are questions which doubtless never occurred to the draughtsmen of the statute in question; but they are live ones and sooner or later must reach the courts. In the case of Louisa Co. *v.* Bibb alluded to in our last number however an appeal was taken *by the County* against the decision of the lower court which was reversed. No point was raised in this case as to jurisdiction, but the appeal was by the County not by the Attorney for the Commonwealth. In the meantime the position of the unfortunate attorney for the Commonwealth is, to say the least of it, decidedly awkward.

Criminal Law in the Supreme Court of the United States. Homicide, Self Defense, Duty to Retreat.

It is very seldom that questions of criminal law reach the Supreme Court of the United States, and it is always interesting to notice how that court treats criminal cases.

In the case of *Brown* v. *United States of America,* the Supreme Court of the United States—Mr. Justice Holmes delivering the opinion, and Mr. Justice Pitney and Mr. Justice Clarke dissenting—have in our humble judgment laid down a new rule of law in regard to self defense. It appears that a man named Hermis had threatened the defendant, had once assaulted him with a knife and had made threats which had been communicated to the defendant. On the day of the killing the defendant was superintending excavation work for a postoffice. In view of Hermis's threats he had taken a pistol with him and laid it down on his coat upon the dump. Hermis was driven up by the witness in a cart to be loaded and the defendant said that certain earth was not to be removed; whereupon Hermis came towards him—the defendant Brown says,

with a knife. He retreated some twenty or twenty-five feet to where his coat was and got his pistol. Hermis was striking at him and the defendant fired four shots and killed him The judge of the lower court laid down the law as settled tha in considering the question of self defense the party assaulted is always under obligation to retreat *so long as retreat is open to him,* provided he could do so without subjecting himself to the danger of death or great bodily harm. The judge reinforced this instruction by stating that unless retreat would have appeared to a man of reasonable prudence in the position of defendant as involving danger of death or serious bodily harm, that he was not entitled to stand his ground. That these instructions are wrong no reasonable criminal lawyer we believe would question, and therefore that the case might have been reversed it seems to us is without doubt, because in our humble judgment the instructions went too far. Mr. Justice Holmes in delivering the opinion of the Court said that the question was brought out with sufficient clearness and that the formula as laid down by the court had often been repeated by the ancient law, and he therefore proposed to state the law as it ought to be:

> "It is useless to go into the development of the law from the time when a man who had killed another, no matter how innocently, had to get his pardon, whether of grace or of course. Concrete cases or illustrations stated in the early law, in conditions very different from the present, like the reference to retreat in 3 Co. Inst. 55, and elsewhere, have had a tendency to ossify into specific rules without much regard for reason. Other examples may be found in the law as to trespass *ab initio* (Com. *v.* Rubin, 165 Mass. 453, 43 N. E. 200), and as to fresh complaint after rape (Com. *v.* Cleary, 172 Mass. 175, 51 N. E. 746). Rationally the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt. The law has grown, and even if historical mistakes have contributed to its growth, it has tended in the direction of rules consistent with human nature. Many respectable writers

> agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and that if he kills him, he has not exceeded the bounds of lawful self defense. That has been the decision of this court. Beard *v.* United States, 158 U. S. 550, 559, 30 L. Ed. 1086, 1090, 15 Sup. Ct. Rep. 962, 9 Am. Crim. Rep. 324. Detached reflection cannot be demanded in the presence of an uplifted knife. Therefore, in this court, at least, it is not a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him. Rowe *v.* United States, 164 U. S. 546, 558, 41 L. Ed. 547, 551, 17 Sup. Ct. Rep. 172. The law of Texas very strongly adopts these views, as is shown by many cases, of which it is enough to cite two: Cooper *v.* State, 49 Tex. Crim. Rep. 28, 96 S. W. 1068; Baltrip *v.* State, 30 Tex. App. 545, 549, 17 S. W. 1106."

It appears in this case that the defendant Brown fired his last shot after Hermis was down, and the Justice states, "If the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others, while the heat of the conflict was on and the defendant believed that he was fighting for his life, when his assailant had been shot once or twice and was down on the ground, but we do not believe that a man in his position ought to be held responsible under the circumstances."

The law is very well settled in Virginia that there is no general rule in regard to the questions of reasonable belief of imminent danger, or how far or under what circumstances a man must retreat, the circumstances in each particular case governing the law. The Virginia court says in one or more cases that the distinction between the circumstances under which a defendant is compelled by law to retreat before killing his assailant to preserve his own life or to prevent the infliction of great bodily harm upon him, and those under which without retreating he may kill his assailant in self defense, is well and sharply drawn. If a man is assailed in the dead of night in

the public road or street, or is assailed in his own house, it would be absurd to say that he should retreat, but the concensus of opinion appears to be as laid down in Dock *v.* Commonwealth, 21 Grat. 909, and repeatedly followed, it must appear before the mortal blow was given that the slayer declined further combat and retreated as far as he could with safety. But in the instant case we do not see the necessity of the decision as rendered by Justice Holmes in laying down the law as to retreating, for Brown certainly retreated, and only got his pistol after he had retreated and been followed by his assaillant with a dangerous weapon in his hand. We think the Virginia rule as laid down in the cases we have mentioned is the only safe one.